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No. 275.

Brief of Ricketts for D. E.

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BRIEF ON BEHALF OF RICHARD P. THOMAS,

DEFENDANT IN ERROR.

Filed Jan. 12, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 275.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,

Plaintiff in Error,

vs.

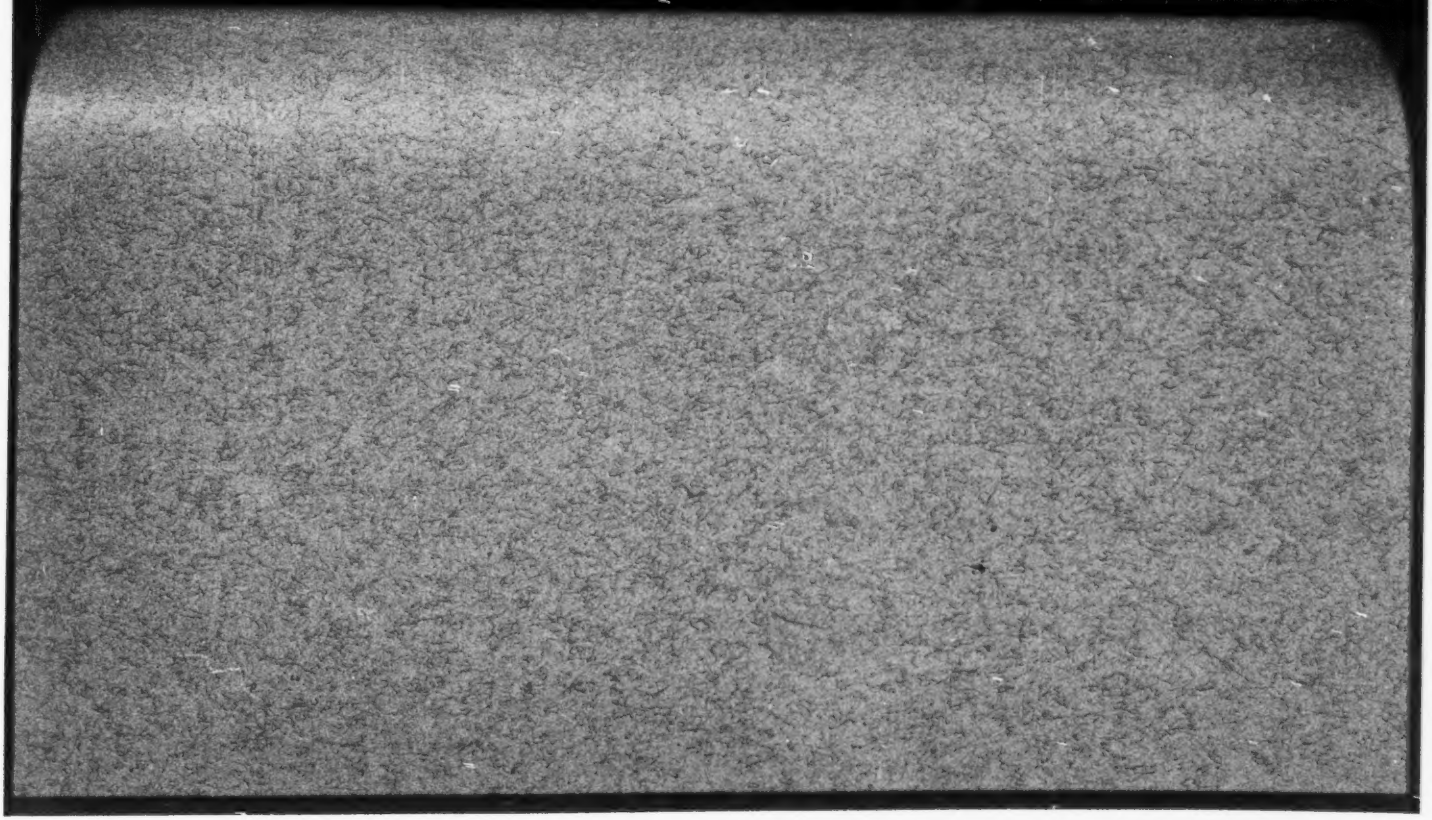
RICHARD P. THOMAS,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

A. H. RICKETTS,

Counsel for Defendant in Error.



(16,452.)

In the Supreme Court of the United States. October Term, 1896. No. 673.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, Plaintiff in Error,

vs.

RICHARD P. THOMAS, Defendant in Error.

In Error to the Supreme Court of the State of California.

BRIEF ON BEHALF OF RICHARD P. THOMAS, DEFENDANT IN ERROR.

In the Petition for Writ of Error (Transcript 109), John Chetwood, Jr. is named as one of the defendants in error. In printing the transcript, his name has been omitted from the caption, perhaps through mistake. We follow the caption of the transcript, and throughout this brief refer to Richard P. Thomas as the Defendant in Error.

The case sought to be reviewed here came before the Supreme Court of the State of California on an appeal from a judgment of the Superior Court of the City and County of San Francisco, State of California, rendered in favor of the plaintiff in error and against the defendant in error Richard P. Thomas for $139,419, interest at 7 per cent from December 15, 1888, and costs, in an action entitled John Chetwood, Jr., plaintiff, v. The California National Bank of San Francisco, a corporation, Richard P. Thomas, Robert R. Thompson, Robert A. Wilson and S. P. Young, Receiver of said bank, defendants.

History of the Case.

The history of the case, as disclosed by the record, is as follows: On December 15, 1888, The California National Bank of San Francisco, incorporated under the National Banking Act, being unable to meet its obligations, suspended business and closed its doors. On January 14, 1889, the Comptroller of the Currency of the United States, having completed a preliminary examination of the condition of the bank through the Bank Examiners, declared the corporation insolvent under the Act of Congress entitled "An Act authorizing the appointment of Receivers of National Banks and for other purposes," approved June 30th, 1876, and appointed a Receiver to take charge of its affairs. Such Receiver at once qualified and entered upon the duties of his office, and was in office at the time of the commencement of the action. On the 19th day of July, 1890, John Chetwood, Jr., holding twenty shares of the capital stock of the corporation, commenced this suit as a stockholder, for the benefit of the corporation, against the defendant in error and the defendants Thompson and Wilson, composing the Executive Committee of the Board of Directors of the Bank, to recover four hundred thousand dollars as damages for negligence, being the amount claimed to have been lost to the bank by reason of bad loans made by the Cashier, and which losses, it was alleged, would not have occurred if the said three directors had properly supervised the acts of the Cashier,—a supervision claimed to have been imposed upon them as members of said Executive Committee by the By-Laws of the corporation,—and made the corporation and the Receiver parties defendant. On the 10th day of January, 1893, the plaintiff filed his amended complaint. Demurrers were interposed by the several defendants and were overruled, and the case went to issue on the 9th day of June following upon the answer of the defendants Thompson and Wilson, and a stipulation that that answer should stand as the answer of the defendant in error Thomas and the corporation. The Receiver did not answer. On April 27, 1894, the trial having ended, the Court made its minute order directing a judgment to be

entered in favor of the plaintiff therein for the benefit of the corporation and against the defendants therein—Thomas, Thompson and Wilson, and for the purpose of determining the amount for which the judgment should be entered, directed the appointment of a Referee to state an account of the amount due to the Bank from the said Richard P. Thomas, R. R. Thompson and Robert A. Wilson. (Trans., 59.) Subsequently, such Referee was duly appointed and on the 17th day of August, 1894, he reported the amount in which the three parties named in said order of reference were indebted to the Bank on the date of its suspension. On September 13, 1894, the plaintiff therein and the defendants therein Thompson and Wilson, appeared in the Superior Court and stipulated that the action should be dismissed as to Thompson and Wilson; whereupon a judgment was entered, dismissing the action as to them (Trans., 64–69.) The consideration for such dismissal was the payment by them of the sum of $27,500.00, which sum was received by the plaintiff therein, and credited upon the amount found to be due to the Bank by reason of the Cashier's bad loans. (See Findings, trans., 87.) Defendant in error Thomas was not a party to this arrangement, nor did he have any notice of such proposed settlement, or of the plaintiff's intention of dismissing the action as to Thompson and Wilson. After this settlement was made with Thompson and Wilson, and on the 20th day of November following, findings were filed in which it was expressly found that the amount of the actual loss to the corporation was the sum of $166,919, that $27,500.00 had been paid on account of such loss by Thompson and Wilson, and that the net loss to the Bank was $139,419.00, for which amount, the Court ordered a judgment to be entered against defendant in error Thomas alone. Pursuant to said order judgment was entered accordingly.

Upon an appeal from this judgment by defendant in error to the Supreme Court of the State of California, the judgment was reversed, and a judgment for costs directed by the Appellate Court to be entered in favor of the defendant in error against the plaintiff in said action Chetwood, and, in so deciding, the Appellate Court held that the suit sounded in *tort,*

being for the recovery of damages for negligence. The reversal of this judgment was based on three grounds: 1—That the Trial Court failed to find upon the most material issues of the case. 2—That the case made out by the findings is a different case than that presented by the Pleadings. 3—That the acceptance by plaintiff in said action of $27,500 from two of the defendants therein, Thompson and Wilson, was a *retraxit* and an extinguishment of the cause of action against all.

Various other objections were advanced on appeal by the defendant in error here, but the Appellate Court considered it unnecessary to pass upon them, that Court expressly stating in its opinion (Trans. 98) that, upon the points raised and not passed upon, its silence was not to be construed as a determination of them.

A motion to dismiss this Writ of Error in that: 1—No federal question was raised in the State Court in the action in which said judgment was rendered. 2—There is no federal question in said action. 3—Even if there is a federal question involved in said action, the decision of the Appellate Court was placed upon an independent ground, not involving a federal question—has been made and submitted with briefs *pro* and *con*, but this Court has postponed action upon the motion to dismiss until the cause came before it regularly on its merits.

The assignments of error are numerous, somewhat verbose, and, we may be pardoned in saying, somewhat tautological. We think there are only three propositions arising from the record which require discussion, the determination of any one of which in favor of the defendant in error, must necessarily result in the affirmance of the judgment of the Supreme Court of the State of California, unless the motion to dismiss shall have prevailed. These three propositions generally stated are as follows:

A.

The Bill in the original action fails to state a cause of action against any of the defendants therein named.

B.

The case found in the Findings is not the case presented by the pleadings.

C.

The Findings do not sustain the judgment.

A.

The Bill in the original action fails to state a cause of action against any of the defendants therein named.

The Amended Complaint, upon which the case went to trial and which will hereafter be called the "Bill" (Trans. 1–24), shows that the plaintiff sued as a stockholder for the benefit of the defendant corporation, and alleges a demand upon the Board of Directors of the corporation, the Receiver and the Comptroller to bring the action and their refusal. The Bill sets forth the organization of the defendant corporation as a National Bank on October 20th, 1886, with a capital stock of two hundred thousand dollars divided into two thousand shares of the par value of one thousand dollars each; and alleges that the entire capital stock was subscribed for by various persons and fully paid and that plaintiff has owned twenty shares from its organization; that the Articles of Association provided for a Board of Directors to consist of seven shareholders and that such Board was duly elected at the first meeting of shareholders at the time of the organization of the corporation, and entered upon the discharge of its duties; that the Articles of Association provided that such Board of Directors should elect from their number a President and Vice-President; should define the duties of the officers and clerks of the corporation; should make all By-Laws which it might be convenient and proper to make for the general regulation of the business of the corporation and the management and administration of its

affairs, and generally to do and perform all the acts legal for a Board of Directors to do; the election of the three individual defendants,—the defendant in error, Thompson and Wilson,—as three members of the Board of Directors, at the first election for Directors, and their subsequent re-election at all subsequent annual meetings; and the holding of a meeting of the Board of Directors after their election, at which a Code of By-Laws was adopted which has never been changed. It then sets forth Section 7 of the Code of By-Laws, which provides for the appointment by said Board of Directors of a committee to be known as the Executive Committee to consist of the President and Vice-President and one or more Directors, "who shall have and exercise immediate supervision of all the affairs and business of the bank; who shall audit all bills for current and other expenses, who shall have power to discount and purchase bills, notes and other evidences of debt as well as power to buy and sell bills of exchange, coin and bullion, and loan money on personal security, and who shall report to the Board of Directors at each regular meeting," and also sets out Sections 17 and 18 of said Code of By-Laws, which regulate respectively the duties of the President and Vice-President. It further alleges the election of defendant in error as President, and of the defendant Wilson as Vice-President, of the corporation, and the appointment of the defendant Thompson as one of said Executive Committee to act with defendant in error and Wilson, and avers that said three defendants constituted the Executive Committee from the organization of the Bank until its suspension. It then alleges that *as such Executive Committee* certain duties were imposed upon the three members who not regarding their duties, "but wholly disregarding the same and contriving together to injure and deceive the said corporation, neglected and omitted, without any reasonable excuse, to exercise their own skill, care, judgment and discretion in the making of loans and discounts out of the moneys in the possession of said Bank and otherwise directing the business of said Bank, but they negligently permitted the Cashier of said Bank to control and manage the whole business of the said Bank as he saw fit and without consulting or in any wise in-

forming the said defendants or any or either of them, to lend the moneys of the Bank according to his own pleasure, to buy bills of exchange without any consultation with said defendants," and then avers that the said Cashier did loan out the moneys of the Bank to "irresponsible persons with no adequate security, bought unauthorized, unsecured & valueless bill of exchange," and that by said negligence the moneys of the Bank were wasted to the sum of about Two Hundred Thousand Dollars. Then, there are certain specific instances alleged where moneys were loaned by the Cashier and not returned, aggregating, Eighty-five Thousand Five Hundred Dollars. Then comes an allegation that " by divers other like careless, unbusinesslike & improvident loans & transactions the said Cashier misused & lost divers other sums of money belonging to the Bank, amounting in the aggregate to about $50,000 more." Then follows an allegation that by reason of all said loans and *the failure of the borrowers to return the money*, the capital surplus of the Bank became reduced from Two Hundred and Thirty Thousand Dollars to about One Hundred and Seventy Thousand Dollars, and that said sum of One Hundred and Seventy Thousand Dollars suffered a still further diminution of more than One Hundred and Twenty Thousand Dollars by certain transactions had with one Woodard and one Gutman, and that said reduction rendered it necessary for the Bank to suspend payment and a Receiver to be appointed, and rendered necessary the levying of an assessment of Seventy-five Thousand Dollars upon the stockholders, and that *the members of the Executive Committee* could have prevented the occurrence by giving attention to and discharging the duties of their said trust and that, had they done so, none of said losses and improvident uses of money would have occurred, but that they neglected their duties and permitted the Cashier to do as he pleased with the moneys. Then follows an allegation that the corporation was doing a good business and its profits ought to and would have been very large as it had accumulated Thirty Thousand Dollars in two years, but that this surplus was all lost by the improvident loans of the Cashier and the aforesaid

negligence of the members of the Executive Committee in permitting him to make the loans. It is then averred that the Bank suspended on December 15th, 1888, owing about Four Hundred and Fifty Thousand Dollars; that the Comptroller of the Currency of the United States took charge of the Bank and placed the defendant, S. P. Young, in charge as Receiver, and that in order to pay the debts he had to sacrifice the assets of the Bank to an extent of between twenty and thirty per cent. and that thereby the corporation has lost between twenty and thirty per cent. of its assets, and concludes with a prayer for a decree directing the defendant in error Thomas, and his co-defendants Thompson and Wilson to restore unto the corporation the Four Hundred Thousand Dollars lost by their negligence and that a money judgment against them with legal interest thereon from the time of such loss be rendered in favor of said corporation.

To this amended complaint, special demurrers were interposed by all the defendants (Trans. 10–18) and overruled (Trans. 18).

The proposition presented by the Bill is simply this:—That because the Cashier, an official appointed by the Board of Directors of the Bank, holding his office at the pleasure of the Board, made in good faith, but without the knowledge or advice of the Board, or any of its members, loans which were unpaid at maturity, that a sub-committee of three members of the Board, known as the Executive Committee, are liable to the corporation in a civil suit for the amount of the loans and interest, for the reason that the Board of Directors had, prior to the making of the loans, enacted a By-Law which gave this sub-committee the immediate supervision of the employees of the Bank, and that such liability attached irrespective of the fact that no legal means had been resorted to to collect these notes. In other words, the bill seeks to hold the three members of the Executive Committee as guarantors of all loans made by the Cashier of the Bank.

1.

THE ACTS OF OMISSION SET OUT IN THE BILL, TAKEN AS CONFESSED, DO NOT CONSTITUTE SUCH NEGLIGENCE UPON THE PART OF THE INDIVIDUAL DEFENDANTS IN SAID ACTION, AS TO RENDER THEM OR ANY OF THEM LIABLE FOR DAMAGES TO THE CORPORATION.

From an examination of this Bill it will be seen that the suit is not brought against the three individual defendants therein *as Directors*, but is against them as *members of the Executive Committee*. But even then it is not to recover moneys lost to the Bank by reason of any *fraud* upon the part of the members of the Executive Committee. There is no such intimation, nor is it claimed that any of the moneys so lost benefited in any way any of the members of the Executive Committee. *The Cashier is not charged with fraud.* It is averred that he loaned the moneys of the Bank to "divers irresponsible persons with no adequate security," but it is nowhere averred that he, at the time the loans were made, knew the borrowers to be irresponsible persons or the security offered inadequate; nor is it averred that the members of the Executive Committee knew the borrowers to be irresponsible persons or the security offered inadequate; nor is it averred that the Cashier was incompetent or that any of the members of the Executive Committee had any reason to believe him incompetent, or that any lack of care had been shown by the Board of Directors in selecting him or continuing him in his position. There is no claim that any moneys have been embezzled by anyone, or that loans have been made beyond the statutory limit, or that false entries have been made in the books or that the Directors sent false reports to the Comptroller, or that the Directors knew the Bank was insolvent before the suspension and concealed that fact from the Comptroller or the public. No suspicion of bad faith is breathed from the pages of the Bill. There is no allegation in the Bill as to how the loans were shown to be worthless. Debts are not usually considered worthless until all legal means for their

collection have been exhausted, but it is not alleged that any legal means were ever taken by the corporation to collect these debts. It simply shows that these loans were outstanding at the time suit was brought. For all that appears on the face of the Bill, suits may have been then pending against the borrowers to recover the money, and there is nothing to show but that such suits would terminate happily in the collection of the full amount of the principal and interest of the loans. Upon what theory could even the Directors be held on such a showing? And upon what possible theory could the Executive Committee of the Board of Directors be held on such a showing? The Executive Committee are simply agents of the Directors. If liable at all to a shareholder as Executive Committeemen, their liability, we take it, could not exceed the liability of their principals. What is the liability of Directors of a National Bank in a case of this kind? The Directors are not insurers of the unerring judgment of the Bank's Cashier. The assumption of the duties of Director hardly carries with it an insurance policy to the stock-holders that they would jointly and severally make good to the Bank losses made in the regular and ordinary course of business. Then, if they are not insurers, not guarantors, how can they be required to make good a loss before it is ascertained that any loss exists? The Bill does not even allege that these loans had matured at the time the suit was brought, but, assuming that they had matured and were unpaid, would not the corporation or its Receiver have to make some legal effort to collect the loans before it could be claimed that they were lost to the Bank? Gentlemen who accept the office of Directors of a Bank are usually engaged in some other business, and they are generally wise enough to employ skilled officers to attend to the Bank's business. Would they not have a right to trust their Cashier, and, before they could be held liable for his errors of judgment in discounting paper or making loans, would it not have to be shown at least that the Cashier had acted in bad faith? Yet, there is not one line in this whole bill intimating that the Cashier acted in anything except the best faith.

There is no provision in the National Banking Law which

holds the Directors liable for bad loans made by an employee. Section 5209 Revised Statutes provides that "every President, Director, Cashier, Teller, Clerk, or Agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds or credits of the association," shall be deemed guilty of a misdemeanor, and Section 5239 provides that "if the directors of any National Banking Association shall *knowingly* violate, or *knowingly* permit any of the officers, agents or servants of the association to violate any of the provisions of this Title, all the rights, priveleges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial Court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." These are the only provisions in the National Banking Laws regulating the liability of Directors. Before they could be sued for damages under this section, the franchise of the Bank would have had to be adjudged forfeited by a Federal Court in a suit brought for that purpose by the Comptroller of the Currency himself, and even then before they could be held liable for the losses it would have to be shown that they *knowingly* violated or *knowingly* permitted the officers or employees of the Bank to violate the provisions of the Banking Act. *Knowledge* upon the part of the Directors is not charged in the Bill. Indeed it is averred that the bad loans were made by the Cashier without "any consultation with said defendants or any, or either of them." (Trans. 13.) So, in the absence of any statutory liability, the civil liability of these defendants, if it exist at all, exists at common law.

We have not been able to find any case parallel to this in the books. In all the reported cases the suit has been against *Directors as Directors*, not as members of a sub-committee of

the Board for failure to perform a duty under a By-Law, and the Bill has alleged, in some shape or other, fraud or wilful misconduct upon the part of the Directors, and in all the cases the Directors who participated in the fraud have been made parties defendants, but all such suits have been brought to recover damages against such Directors for doing something which they should not have done. There have been a number of cases brought by stockholders of suspended banks, seeking to hold the Directors liable in damages for the bad loans, or misapplication of funds which has resulted in the Bank's failure, but in every case *knowledge* of the misapplication of the funds has been averred. Most of these suits have arisen in the Federal Courts. We refer only to those cases where the principles involved are similar to the principles involved in the case at bar.

In Witters *vs.* Sowles, 31 Fed., 1, (Circ. ct. Dist. Vermont) which was an action brought against the Directors of an insolvent national bank by the Receiver appointed by the Comptroller of the Currency, to recover moneys which the Directors had unlawfully disbursed by way of dividends, and also for losses in consequence of bad loans and discounts, it appeared that the business of the Bank was managed principally by the cashier, who was of large experience, able and competent and of good reputation and until near the time of the failure of considerable wealth. All the loans and discounts were made by him. One of the losses complained of was a loan in excess of one-tenth of the capital stock and in violation of the provisions of Section 5200 of the Revised Statutes. Two of the defendants were held liable for that sum on the express ground that they participated in and assented to the loan, and on that ground only. The decision was to the effect that the officers of an insolvent National Bank could not be held personally responsible to creditors for losses on loans and discounts made by them in good faith, and as they thought at the time for the best interests of the Bank, merely because such losses and discounts appeared to be unwise and hazardous when looked back upon. *In re* Spering's Appeal, 71 Pa. State, 13, (Supreme Ct. Pa.) it was held that while the Direct-

ors were personally responsible to the stockholders for any loss resulting from fraud, embezzlement, or wilful misconduct or breach of trust for their own benefit and not for the benefit of the stockholders, for gross inattention and negligence by which such fraud or misconduct had been perpetrated by the agents, officers or co-directors, yet they were not liable for mistakes of judgment even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest, and provided they are fairly within the scope of the power and discretion confided to the managing body. Judge Sharswood in that case speaking for the Court says: "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any other bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries, —persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence but no more. * * * We are dealing now with their responsibility to stockholders, not to outside parties,—creditors and depositors. It is unnecessary to consider what the rule may be as to them. Upon a close examination of all the reported cases, although there are many *dicta* not easily reconcilable, yet I have found no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say by any means that the irresponsibility is limited to these cases, and that there might not exist such a case of negligence, or of acts clearly *ultra vires*, as would make perfectly honest directors personally liable. But it is evident that gentlemen selected by the stock-holders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentlemen of

character and responsibility would be found willing to accept such places." In Land Credit Co. *vs.* Fermoy, L. R. 5, Ch. 763, this rule was laid down by Lord Hatherley: "Whatever may be the case with a trustee, a director cannot be held liable for being defrauded. To do so would make his position intolerable." In Re Dean Coal Min. Co., 10 Ch. Div., 450, Sir George Jessel, M. R., says: "One must be very careful in administering the law of joint stock companies not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the Court should do its utmost to bring fraudulent directors to account; and, on the other hand, should also do its best to allow honest men to act reasonably as directors. Wilful default no doubt includes the case of a trustee neglecting to sue, though he might by suing earlier have recovered a trust fund. In that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle." Preston *vs.* Prather, 137 U. S. 604, was a case of persons engaged in the business of banking, having received for safe keeping a parcel containing bonds, which was put in their vaults. They were notified that their assistant cashier, who had free access to the vaults where the bonds were deposited and who was a person of scant means, was engaged in speculation in stocks. They made no examination of the securities deposited with them, and did not remove the Cashier; and it was held that the bankers were guilty of gross negligence, and were liable to the owner of the bonds for their value at the time they were stolen. Mr. Justice Field delivering the opinion of the Court says: "Undoubtedly, if the bonds were received for safe keeping, without compensation to them in any form, but exclusively for the benefit of the plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another without consideration is bound either in

law or morals to do more than a man of that character would do generally for himself under like conditions." In the case at bar it is not claimed that by reason of the inattention and negligence of the Executive Committee any fraud or misconduct was perpetrated by the agents or officers of the Company. It is simply claimed that by reason of their inattention and negligence, loans were made by the Cashier which resulted in a loss to the Bank. Throughout the whole Bill there is nothing to show that the members of the Executive Committee or the Directors knew that these loans were being made by the Cashier, and if they had no knowledge of the Cashier's action, how can they be held liable for failure to stop the making of the loans? Clews *vs.* Bardon, 36 Fed. 617, was in the nature of a bill by the stockholders of a National Bank against the Directors to recover losses incurred in consequence of loans and discounts which turned out to be bad, on the ground of the alleged negligence of the said Directors in permitting such loans to be made in excess of the legal limit provided by the National Banking Law. Among the charges made was one that the Directors allowed the Cashier of the Bank to make bad loans of money which the Directors afterwards compromised at twenty cents on the dollar, netting a heavy loss to the Bank. The opinion is by Bunn, J., Circuit Court, E. D. Wisconsin, and was rendered in 1888. The following is from the opinion :—"Though the testimony is quite voluminous, these seem to be the leading facts on which the case must be decided, and the question is whether there is enough proven on behalf of the complainants to make the defendants liable, under the provisions of the banking act, for the loss to the stockholders. There is not, if by a proper construction of the statute it is necessary to show that the directors had actual knowledge, or in some way participated in, connived at, or assented to, the violation of the law on the part of the Cashier ; because there is no evidence even tending to show any such knowledge, participation, or complicity on the part of directors. The evidence shows, on the contrary, that they had no knowledge of any such violation of the law until after it took place ; nor did they approve or consent to it. But, as I understand the position

of complainant's counsel, it is that such actual knowledge or consent need not be shown; that it is enough to show that the directors, who, by virtue of their office, are vested with the authority and duty to look into and manage the affairs of the bank, if they conferred that authority, and imposed that duty, upon the cashier, and allowed him to manage the bank,—that the directors are legally chargeable with knowledge of all that the cashier did. But I cannot think that such a mere constructive knowledge of or assent to the illegal acts of the cashier, in the circumstances of this case, is what is contemplated by the statute as sufficient to charge the directors personally, with all the consequences of such illegal acts. This might and probably would be so, if the exclusive duty of managing the active affairs of the Bank was devolved upon the Directors. But it seems clear enough that, under the law as it stands, and as it stood in 1882, the management of the Bank might be intrusted either to the Directors or to the Cashier or other officers. If this was the case, then it would be just as legal and proper to intrust the matter of making loans and discounts to the Cashier, as was done in this case, as to intrust the same duty to the Directors. And every business man knows as a matter of common observation, throughout this part of the country at least, that business is generally left with the officers of the bank, rather than with the directors. And in all such cases the position of a director would be intolerable if, having his own money invested in the bank, and himself acting without compensation, and having exercised all the diligence in his power in the proper selection of the officers, he were to be chargeable with the mistakes and shortcomings of such officers. I think the Banking Act places their liability upon the true ground, and that it stands about as it would in the like circumstances at the common law. In either case the director is bound to good faith. He must act honestly. He must not commit fraud, nor be privy to it, nor wilfully shut his eyes, and abstain from making inquiries. If he has knowledge that an illegal transaction is to be enacted by the officers in charge, and consents to it, or connives at it, or wilfully shuts his eyes, and permits it to be done, or is guilty of such

gross and wilfull neglect of duty as amounts to bad faith, he will be held responsible. This was so at the common law, and is no doubt so under the Banking Act. But where the directors act in entire good faith, and select a person to manage the affairs of the bank, whom they have every reason to believe is competent and honest, they themselves having had no experience in banking, they have done just what the stockholders themselves would have done in the same circumstances. They have acted prudently, and with proper caution, as ordinarily prudent business men would act in reference to their own affairs. Under such circumstances, to hold them chargeable with knowledge of all the illegal acts of the person selected to manage the bank would be a harsh rule. The honor of being a resident director would scarcely compensate for such a responsibility. The directors, in this case, I think used all proper caution and diligence in the selection of a cashier. He was the person recommended by the principal stockholders, and the one in whom they placed their confidence. His reputation was good, and the directors had entire confidence in his honesty, and ability to run the bank; and, when they had reason to distrust his competency, they took the management of the Bank into their own hands. The evidence does not even raise a suspicion that they did not act in entire good faith from first to last, and I think they acted with ordinary prudence and discretion. They had their own money invested in the stock of the bank. They were giving a portion of their time to forward the common interests of the bank, without pay. Under these circumstances, to hold them liable for the mistakes of the cashier, whom all trusted alike, in making loans in excess of the statutory limitation, to which the directors were not privy, nor consenting, would seem to be harsh and inequitable. And I cannot think that such a construction of the act of Congress can be maintained, and I am the more confirmed in this view by the few adjudged cases that have arisen under these provisions." But the suit at bar is not to recover moneys loaned in excess of the statutory limitation, and there is no allegation in the Bill we are considering that any of the loans of the Cashier were compromised *and*

the actual loss to the Bank ascertained. It will be noticed that in the case last above cited the actual loss to the Bank was ascertained before the suit was brought, and properly alleged in the Bill. Briggs *vs.* Spaulding, 141 U. S. 132, was a suit by the Receiver for the First National Bank of Buffalo against the Directors and personal representatives of deceased directors of the bank to recover damages for the misconduct of the directors and their failure to perform faithfully and diligently the duties of their office, and particularly for failing to keep correct books of account and employing competent officers and in supervising the business, as a result of which, bad loans were made by incompetent and dishonest officials known by the directors, it was alleged, to be incompetent and dishonest at the time they were appointed and the bank made a heavy loss and had to suspend business. The decision is by Chief Justice Fuller. The case is a very strong one, and we think decisive of the question we are discussing. The opinion reviews all the leading decisions on this subject and in every case there mentioned, the Court will find that there are allegations of fraud or wilfull misconduct against the directors. Attention is particularly invited to that portion of Chief Justice Fuller's opinion which quotes approvingly the following language from the opinion of Vice Chancellor McCoun in Scott *vs.* Depeyster, 1 Edw. Ch. 513:—"I know of no law which requires the "president or directors of any moneyed institution to adopt a "system of espionage in relation to their secretary or cashier "or any subordinate agent, or to set a watch upon all their "actions. While engaged in the performance of the general "duties of their station, they must be supposed to act honestly "until the contrary appears; and the law does not require "their employers to entertain jealousies and suspicions without "some apparent reason. Should any circumstance transpire "to awaken a just suspicion of their want of integrity and be "it suffered to pass unheeded a different rule would prevail "if a loss ensued, but without some fault on the part of the "directors amounting either to negligence or fraud, they can-"not be liable," and counsel is respectfully requested to point out a single allegation in the Bill under review of what pur-

ports to be a fact in reference to the conduct of the cashier which, brought to the attention of the Directors, as men of ordinary intelligence, would be calculated to awaken in their minds a suspicion of a want of integrity or business capacity upon the part of that official. It must also be borne in mind that in the case at bar the Executive Committee did not appoint the cashier. He was appointed by the Board of Directors. The national banking law vested the appointment of a cashier solely in the Board of Directors. It gave the Board alone the power to dismiss him and appoint another to fill his place. (Section 5136 Rev. Stat.) There is no allegation in the Bill we are considering that by the exercise of ordinary care the Directors could have ascertained that the cashier was making these loans. There is no allegation that an examination of the books would have resulted in a discovery that loans were being made, nor is there any allegation upon which to justify the belief that the Executive Committee, even if acting honorably, would have acted any differently from the cashier if they had known that applications for loans had been made. In Savings Bank *vs.* Caperton, 8 Southwestern Rep. 885 (Court of Appeals, Ky.) suit was brought to recover from the directors moneys that had been embezzled by the cashier, yet, the judgment was in favor of the directors, the Court holding that there was no reason to charge the directors personally by reason of the fraud of the cashier, when no breach of duty on the part of the cashier had been brought home to the directors and the defalcation resulted from no act of their own. In the Chemical National Bank of New York *vs.* Armstrong, 65 Fed. Rep. page 573,—Circuit Court of Appeals for the Sixth Circuit,—the Court refused to hold the Fidelity National Bank of Cincinnati liable for money borrowed by its Vice-President without the authority of the Board of Directors from the defendant bank. In Robinson *vs.* Hall, 63 Fed. Rep. 222—from the Circuit Court of Appeals for the Fourth Circuit—the Court held that a bill filed by the receiver of an insolvent national bank against the directors of the bank charging them with personal liability for certain losses caused by their negligence stated a sufficient cause of action, but in that case, the facts

were very different from the facts in the case at bar. There, the entire management of the Bank had been practically left to the cashier by the Board of Directors for three years. The Bill alleged fraud upon the part of the cashier, the fraudulent transactions beginning in 1888 and extending through 1889 and 1891. There had been during these years considerable scandal in connection with the affairs of the bank. Money had been loaned, mortgages had been taken to secure the loans and the Board of Directors had failed to record the mortgages. Prior to the suspension of the bank, the Directors who had been heavy depositors during the existence of the bank practically withdrew their deposits. The Bill alleged that the Cashier Bowdon had withdrawn from the Bank and fraudulently converted to his own use a large sum of money, and that upon the suspension of the bank he became a fugitive from justice. It further alleged that the Board of Directors knew the Bank was insolvent for two months before its suspension, but fraudulently concealed the fact from the public and its creditors, except such depositors as the directors desired to favor. At page 227 the Court after reviewing the decision of the Supreme Court of the United States in Briggs *vs.* Spaulding, supra, says: "In the case at bar we have an essentially different state of facts to consider. The frauds and irregularities which resulted in the ruin of the bank went on through a period of more than three years, during all of which time the defendant directors were in office. Many of these irregularities were not things of secret occurrence and sudden development. They were such as must have been known to the defendants, if they gave even the most casual attention to the affairs of the bank. The embezzlement of Bowden, the $45,000 loans to the Northrops and to Kerchner, and the losses resulting, were facts that could not have eluded the most cursory attention of the directors to their duties. In respect to their omission to register the mortgages, it is a mistake to suppose that the directors of national banks cease to be such, and that their duty to the bank lapses, when an examiner is put in charge of its funds, properties, and books by the Comptroller of the Currency. It is incumbent upon them to give attention to these

affairs even more specially after the examiner takes charge than before. In the case at bar it was especially their duty to register the mortgages held by the bank from Mitchell, Boatwright, and the Northrops. Their duty was the more special and urgent in respect to these securities in consequence of the fact that the management of the affairs of the bank had been taken from its own executive officers and committed to a temporary officer appointed by the comptroller, who in all probability was unfamiliar with the registration laws of North Carolina. They were still as much the advisers of the bank examiner as they had been of the cashier, notwithstanding they were not invested by law with the control over him, which they were empowered to exercise over the cashier. It was especially the duty of the defendant directors, acquainted as they were with the local laws of registration, to see to and make certain the prompt registration of the three mortgages. Their duties as directors did not cease in these respects until after the appointment of the receiver of this bank. In respect to the action of the defendants, or some of them, in checking out their deposits two months before the suspension, in full knowledge that such an event must occur, there could be no adjudication except after plenary proofs. That depositors generally are at liberty to check out the entire funds at their credit before suspension is clear; but even they, after suspension, are entitled only to such percentage of their deposits as the assets of the bank will liquidate. If directors are depositors, and know two months or more before suspension that that event is inevitable, and that the bank can pay only a percentage of its deposits, and yet check for the whole of their own balances, thereby diminishing the percentage to which other creditors would be entitled, they certainly defraud, to the extent of the diminution, the creditors whose interest they are relied upon to protect, and should be held to strict accountability.'' This decision is upon the theory that the defendant directors were guilty of fraud.

We do not wish to be understood as taking the position that under no circumstances could the directors of a National Bank be held liable for damages resulting from bad loans made by their cashier. If the funds of the bank had been stolen or mis-

appropriated by a dishonest cashier, when, by the exercise of ordinary care, the directors could have discovered his dishonesty in time to prevent the theft or misappropriation, but had failed to exercise such ordinary care, or, notwithstanding such knowledge, had retained the dishonest official in the employ of the bank, they would be liable for the sums stolen or misappropriated by him, or, if they had trusted the business of the bank to an incompetent cashier, whose incompetency was known to them at the time of his employment, or, by the exercise of ordinary care, could have become known to them, they would, under certain circumstances, be liable for the losses made by such incompetent cashier, provided the losses occurred after the knowledge of the incompetency had been or could have been obtained,—but that is not the case here. This is not a case of misappropriated or stolen funds, or of dishonest or incompetent officials. So free was this case from any suspicion of dishonesty that the trial judge in delivering the judgment of the Court used the following language in his written opinion on file in the Superior Court in this case, and to which we now refer and beg to make a part of this brief: "I have given the testimony in this case careful consideration "and devoted much time to an examination of the law appli- "cable thereto and have arrived at the conclusion that plaintiff "is entitled to a judgment in his favor against the defendants "Thomas, Thompson and Wilson. * * * It is but "proper and just to the defendants to state that no claim was "or is made by the plaintiff that said defendants or either of "them were guilty of any fraud, collusion or direct personal "wrongdoing in their relations with said bank other than a "want of proper supervision over its affairs and its cashier. "Their personal integrity is not and has not been impeached "in any manner and there is no testimony in the case casting "any imputation on the honesty and fair dealing of either of "said defendants with the affairs of the bank. The sole and "only ground upon which the liability of the defendants is "claimed and upon which ground only the Court finds against "the defendants is that as officers of the Bank and its Exec- "utive Committee they were derelict in not paying that care

"and attention to and control over its affairs and its cashier "as was required of them by the by-laws of said bank as well "as the general law of the land and which constitutes such "negligence on their part as makes them liable to the stock-"holders for losses sustained by them."

When this case was before the Supreme Court of California, counsel for the plaintiff in the original action, John Chetwood, Jr., cited the following authorities in support of his contention that the Bill stated a cause of action, and as they will probably be relied upon here, for the plaintiff in the original action has simply used the name of the Bank to sue out this writ of error, we take the liberty of anticipating their citation :

Hun vs. *Cary*, 82 N. Y. 65.
Shea vs. *Mabry*, 69 Tenn. 319.
Brinkerhoff vs. *Bostwick*, 88 N. Y. 52.
Wallace vs. *Lincoln Savings Bank*, 89 Tenn. 631.
Delano vs. *Case*, 121 Illinois, 247.
Ackerman vs. *Halsey*, 37 N. J. E. 356.
Landis vs. *S. I. C. Hotel Co.*, 31 Atlantic, 755.
McMullen vs. *Ritchie*, 64 Fed. 253.

We will take these cases one by one and show that in every one of them the bill alleged fraud, willful misconduct or misappropriations of funds, which, by the exercise of ordinary care, the directors could have avoided, and we challenge counsel to show one single case where a suit was maintained against bank directors for money loaned by the cashier, in the absence of fraud, wilful misconduct or misappropriation of funds, or such a state of facts in the management of the bank as would put the directors on enquiry.

Hun *vs.* Cary, *supra*, was cited by Justice Harlan in the dissenting opinion in Briggs *vs.* Spaulding. The facts in that case show that the defendants were trustees of a savings bank. Under its charter the bank had power to purchase a lot for a banking house, requisite for the transaction of its business. Its Board of Directors purchased a lot when such purchase was not requisite for the transaction of its business. At the time

of the purchase the assets were insufficient to pay the debts and this fact was known to the trustees. The Court held that the purchase by them of a lot under these circumstances was unnecessary and extravagant and, that the bank having become unable to pay its depositors and having been forced to close its doors as a result of such purpose, a suit would lie against the directors for damage caused to the bank by their willful and inexcusable conduct. This is not a case of bad loans made by the cashier. This is a case of inexcusable misconduct upon the part of the directors. In Brinkerhoff *vs.* Bostwick, *supra*, in addition to the various charges of negligence against the directors, it was specifically alleged in the Bill that "they employed "a cashier who was dishonest, unfaithful and incompetent, all "of which was known to them." There is no allegation in the Bill under consideration that these defendants employed a cashier who was dishonest, unfaithful or incompetent, nor is there any allegation that any of the cashier's transactions were dishonest. Wallace *vs.* Lincoln Savings Bank, 89 Tenn. 630, is a very interesting case, and was decided by the Supreme Court of Tennessee at the December term of 1890. The suit is by a shareholder and creditor against the Directors of the Savings Bank. "The liability of the defendants to the corporation" says Lurton, J. "is predicated alone upon the pro- "position that certain losses sustained by the bank during its "fifteen years of business activity were the direct consequence "of the negligence of defendants while directors. The prin- "cipal fact constituting this alleged negligence is a charge "that the board of directors abdicated their trust by failure "to supervise the management, and turned over the entire con- "trol of the business of the bank to the unlimited discretion "and unaided judgment of the cashier; that as a consequence "the bank had sustained great losses through a series of unwise "and undefensible transactions engaged in by the cashier with- "out the aid, advice and supervision of those charged by their "selection with the duty of exercising an intelligent judgment "in the control of that officer. The allegation necessarily is "that these transactions, so disastrous in their consequences, "would have been avoided and these losses escaped but for the

"negligence and inattention of defendants in office at the dates "of the several transactions." A number of specific losses are then recited, the Court proceeds to hold that the complainant can only fix liability upon the defendants by first convicting the cashier of negligence in regard to the specific transactions alleged in the bill, and. citing with approval Bank of Albany *vs.* Ten Eyck, 48 N. Y. 305, goes on to say: "A cashier is bound to exercise reasonable skill, care and dili- "gence in the discharge of his duties. If he fails in such "skill, or omits such care, and the bank suffers damage as a "consequence, he is liable. If entrusted with the duty of mak- "ing loans, he is not responsible as a guarantor of the solv- "ency of his transactions, or responsible for an error of "judgment where he has exercised reasonable skill, diligence, "and prudence. * * * Complainant has not shown "that there was any want of care or prudence in making these "loans or in the subsequent steps taken to secure or collect "them. If the cashier is not chargeable with any want of "care or skill about these matters, then it follows that the "defendants are not liable, for they, at most, can only be lia- "ble for losses resulting from his negligence in these mat- "ters. * * * Directors, by assuming office, agree to "give as much of their time and attention to the duties "assumed as the proper care of the interests intrusted to them "may require. If they are inattentive to these duties, if they "neglect to attend meetings of the Board, if they turn over the "management of the business of the company to the exclusive "control of other agents, thus abdicating their control, then, "they are guilty of gross negligence with respect to their "ministerial duties; and if loss results to the corporation by "the breaches of trust or acts of negligence committed by those "left in control, which by due care and attention on their part "could have been avoided, they will be responsible to the cor- "poration. * * * * Bank directors are not expected to "give their whole time and attention to the business of the bank. "The customary method in regard to such associations is that "the active management and responsible custody is left to the "cashier and other agents selected by the directors for that

" purpose. These are paid salaries, demanding their skill and " time should be given to the duties of immediate management. " As a rule, the custodian of the assets is the cashier. The " duty of directors with respect to such is to supervise, direct " and control. These agents though usually selected by the " directors are not the agents of the directors but agents " of the corporation. The neglect which would render " them responsible for not exercising their control and direction " properly must depend upon the circumstances of each par- " ticular case. *They are not insurers of their fidelity and they are* " *not liable for their acts on any principle of the law of agency.*" Delano *vs.* Case—*supra,* cited also in the dissenting opinion in Briggs *vs.* Spaulding, was a suit by a general depositor of a bank against directors of the bank for damages in permitting the Bank to be held out to the public as solvent, when in fact at the time it was insolvent, and such insolvency known to the directors, and upon the strength of which false representations the plaintiff became a depositor and lost his money. Ackerman *vs.* Halsey, *supra,*—also cited in the dissenting opinion in Briggs *vs.* Spaulding—was a bill filed by a creditor and stockholder of a national bank against the directors. The bill alleged that the directors caused reports of the condition of the bank to be published from time to time; that these reports stated in substance that the capital was unimpaired and that the bank had a large surplus over and above the payment of its debts and liabilities and was in a sound and solvent condition, while in fact it had no surplus for several years before its failure and was insolvent, and that the complainant relying upon the truth of these reports had purchased the stock. It then alleges that certain of the funds of the institution had been abstracted and misappropriated by the cashier, who abstracted and misapplied the assets of the bank exceeding the sum of Two Million Dollars, which completely ruined the bank; that the directors did not honestly and diligently administer the affairs of the bank but suffered and permitted its money, property and effects to be in the possession and under the control of dishonest and incompetent persons and permitted the moneys to be stolen, wasted and

squandered. The bill then goes on to specify false and fraudulent entries in the books readily detectible amounting to Six Hundred Thousand Dollars. In Shea *vs.* Mabry, *Supra*, the following is from the opinion of the Court: "Directors of "corporations are not mere figureheads; they are trustees for "the company, for the stockholders and for the creditors. "They must not only use good faith but also care, attention "and circumspection in the affairs of the corporation and par- "ticularly in the safe keeping and disbursements of funds "committed to their custody and control. *They must see "that the funds are appropriated as intended to the purposes "of the trust; and if they misappropriate them or allow others "to divert them from these purposes, they must answer for it "individually. Ignorance will not excuse them when they have "the means of knowledge.*" That suit was brought by a judgment creditor of a corporation against the members of the Board of Directors, and the bill alleged that they had misappropriated the funds of the corporation in bribing and corrupting the State Legislature, and had squandered and embezzled various sums of money belonging to said corporation. The cases, Landis *vs.* S. I. C. Hotel Co., *supra*, and McMullen *vs.*. Ritchie, *supra*, are dissimilar from the one at bar. In the former case, which was a suit by a stockholder to hold certain directors liable for the value of plaintiff's stock and also for certain moneys advanced by him to the corporation which it had failed to repay, the bill charged that the defendants were directors of a corporation formed to build a hotel, and purchased for its site from themselves the equitable title to a portion of a tract of land at a two hundred per cent. profit to themselves and subsequently manipulated the legal title so as to render the land unavailable for the purpose of raising a loan by mortgage, and when only $25,000 in stock had been subscribed they contracted on the part of the corporation for the erection of improvements involving an outlay of $90,000, in order to themselves realize a profit from the sale of the remainder of the land. On the insolvency of the corporation they virtually became the owners of the land and improvements, leaving nothing for the stockholders. In the latter case,

which was in the nature of a creditor's bill, it was held that the President of a corporation for whom no salary is provided, cannot recover such salary or personal expenses connected therewith for which he had no purpose to charge at the time he assumed office.

2.

IF ANY CAUSE OF ACTION EXISTED IN FAVOR OF THE CORPORATION, IT WAS AGAINST THE DEFENDANTS FOR FAILURE TO PERFORM THEIR DUTIES AS DIRECTORS, NOT FOR FAILURE TO PERFORM THEIR DUTIES AS MEMBERS OF THE EXECUTIVE COMMITTEE.

a.

A Board of Directors cannot delegate its general powers of supervision of the affairs of a corporation to a sub-committee so as to divest itself of liability for breach of its obligation to supervise the corporate affairs.

As a general rule, the powers of a Board of Directors of a corporation cannot be delegated except under an express grant of authority. In the case at bar it cannot be claimed that there was any express grant of authority in the National Banking Laws or in the Articles of Incorporation which authorized the Board of Directors to divest certain of its members from liability by delegating its powers and authority to a sub-committee of three. A Board of Directors has implied authority to appoint a committee of its number with authority to exercise general control over the affairs of the corporation during recess of the Board, and a sub-committee can always be appointed for some special purpose. For instance, the Directors of a Bank may authorize the President or the President and Cashier to borrow money and to draw and endorse negotiable paper in the name of the corporation.

Fleckner vs. U. S. Bank, 8 Wheat 338.
Spear vs. Ladd, 11 Mass. 94.
Merrick vs. Bank, 8 Gill. 59.

And the Board of Directors of a Bank may also delegate to any of their own members authority to mortgage and sell real estate belonging to the Company.

Burrill vs. Nahant Bank, 2 Metcalf 163.

Hoyt vs. Thompson, 19 N. Y. 207.

"Those powers of the Directors of a corporation which it is intended they should exercise personally, can in no case be delegated. The general supervision and direction of the affairs of a corporation are especially entrusted by the shareholders to the Board of Directors; it is upon the personal care and attention of the Directors that the stockholders depend for the success of their enterprise. It follows that authority to delegate these general powers of management cannot be implied." Morawetz on Corporations, Second Edition, Sec. 536. Assuming that the By-Law was an attempt upon the part of the Board to delegate its authority to three of its members and divest itself of liability, then, the Board of Directors had no power to pass such a By-Law, and it was absolutely void, and no action can be maintained to recover damages against the members of a body created by a void By-Law.

We do not claim, however, that the Board of Directors could not clothe the Cashier of the Bank with powers to carry on the business of the corporation, for as we shall see hereafter when we come to discuss the Findings that was exactly what was done, and it was done under subdivision seven of Section 5136 of the Revised Statutes, but we simply claim that it could not shift any responsibility that may have resulted from clothing the Cashier with that power to the shoulders of a sub-committee.

b.

Assuming, that the By-Law was not a delegation of the powers of the Board of Directors, but was only in line with the Board's authority to expedite the business of the corporation by appointing sub-committees who should attend to details and report to the Board for action, then said By-Law was valid and the members of the Executive Committee, appointed under its authority, were the agents of the Board of Directors. The

plaintiff being a stockholder of the corporation was bound to take notice that the Executive Committee was the agent and the Board of Directors the principal, and commence his action against the latter. Under Section 2343, Civil Code of California, there are only three cases in which an agent is liable to third persons, and this case we submit does not come within one of the cases set forth in that section, which reads as follows:

"One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:

1. When, with his consent, credit is given to him personally in a transaction;

2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or,

3. When his acts are wrongful in their nature."

3.

THE BILL FAILS TO ALLEGE THAT THERE ARE ANY OTHER STOCKHOLDERS IN THE CORPORATION OTHER THAN THE PLAINTIFF IN THE ACTION AND THE THREE DIRECTORS SUED.

Section 382 of the Code of Civil Procedure of the State of California is as follows: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all."

It will be observed that before one can bring suit on behalf of a numerous body of persons similarly situated, there must be one of two sets of facts existing; either that the question involved is one of general interest to many, or that the parties

who should unite with the plaintiff are so numerous that they cannot be brought before the Court. The averments in the Bill are simply that at the time this corporation was organized, the whole of the $200,000 worth of stock was subscribed for by divers persons, to-wit: more than one—that is the dictionary definition of the word "divers," more than one, several, —and that Chetwood became and has always remained the owner of twenty shares. He sues the other three parties who were shareholders, members of the Board of Directors and of the Executive Committee. There is no averment in the Bill that the question involved is one of interest to many, and there is no averment that the parties are numerous and cannot be brought before the Court. The rule in regard to that section is, that not only must those facts exist, but they must be stated in the Bill. A party cannot justify the bringing of a suit of this character without stating in his Bill facts which bring him within that provision of the Code, and if he does not state facts that bring him within that provision of the Code, he has not the right to bring the suit.

Pomeroy's Remedies & Remedial Rights, Sec. 390.
Barstown R. R. Co. vs. Metcalf, 4 Metc. (Ky.) 199.
Carey vs. Brown, 58 Cal, 183.

There might be cases imagined in which a stockholder, upon the facts alleged, would be justified in bringing a suit for and on behalf of the corporation, and in which a judgment running in favor of the corporation would be maintained, notwithstanding an averment that the parties were not numerous; but, unfortunately for the plaintiff in the original case, his Bill has left him without that protection. The National Banking Act provides that upon it being reported to the Comptroller of the Currency that a bank is insolvent, he shall examine into its affairs, and if upon such examination, he finds the condition of things to be as specified in the Act, then, he shall declare the Bank insolvent and appoint a receiver to wind up its affairs, and that the receiver shall proceed to wind up the business of the corporation. In other words, while they do not then and there dissolve the corporation, they wind up and close its business, which is, in practical effect, a dissolution. That being the

Banking Act,--the law governing the life of this corporation, —the plaintiff has alleged in his Bill that after having realized upon all the assets of the corporation, and exhausted them in payment of claims, it became necessary to levy an assessment, which the Banking Act authorizes; that this assessment was levied; that $55,000 was paid in under the assessment; and with that money, in addition to what had otherwise been received, the receiver paid all the debts of the corporation. (Trans. 21.) These averments are to the effect that the business of the corporation had been closed. Now, in the absence of an averment in the Bill that there are other shareholders interested beside the plaintiff and the defendant, for whose benefit then could any judgment have been rendered in the action? In other words, the ultimate result and the practical result of the judgment which was ordered by the Court in this case, was to decree that the three defendants owning,-- if our construction of the pleading is correct,--1980 shares of the 2000 shares constituting the capital stock, should pay $400,000—the amount sued for--for the benefit of themselves and the plaintiff. There was no one else to whom the proceeds of this judgment could go but the plaintiff and the defendants. Under this Bill, a judgment was asked for against the defendants for their own benefit, and we venture to say that such a judgment has never been heard of before and probably will never be heard of again. It may be claimed that as the Bill alleges that seven Directors had been elected at the annual meeting prior to the commencement of the action, that that allegation might be sufficient to show that there were at least four stockholders other than the plaintiff and the three Directors sued in the original action; but for all that appears in the Bill, the four gentlemen, who were elected Directors at such annual meeting, may have parted with their stock and ceased to have been either shareholders or Directors immediately thereafter.

4.

THE BILL FAILS TO SHOW THAT THE PROPER DEMAND TO SUE HAD BEEN MADE UPON THE CORPORATION AND THE OFFICERS IN CHARGE OF IT, AND IS THEREFORE FATALLY DEFECTIVE.

The Bill fails to show that any demand was made upon the Comptroller of the Currency of the United States to have the Receiver commence this action. It does appear that a demand was made upon the Receiver himself to bring the suit and that a demand was made upon the Comptroller of the Currency of the United States, as such official, to bring the suit, but the Comptroller could not bring the suit in his own name. The bank was in the hands of a Receiver and the Receiver could not bring the suit without the authority of the Comptroller. It was necessary to request the Comptroller to have the Receiver bring the suit.

In the case of Swope *vs.* Villard, 61 Fed. page 417—Circuit Court, S. D. New York,—the Court held that a stock holder of a corporation which is in a receiver's hands has no right to sue upon a cause of action in favor of the corporation upon the mere refusal of the receiver to sue on the stockholder's request, without showing that he has asked the Court that appointed the receiver to direct him to sue. The receiver in the case at bar had no more power to sue the directors of the corporation without special authority thereto from the Comptroller, than the Receivers appointed by the Court in the case above cited at bar to sue without authority of the Court. Section 5234 Revised Statutes provides that the Receiver "*under the direction of the Comptroller* shall take possession of the books, records and assets of every description of such Association; collect all debts, dues and claims belonging to it &c." The Bill further fails to show that any proper demand was ever made upon the Board of Directors to commence this action. To quote again from the opinion in Swope *vs.* Villard *supra*: "If now, it be assumed that for any reason the receivers were not, by their appointment, vested with the power to enforce the alleged cause of action, then the railroad company was the proper party to sue; and upon this assumption the allegations of the bill do not justify action by the complainant in its stead. All that is alleged in this regard is that plaintiff has requested the directors to sue, and they have neglected and refused to do so. * * * * The bill does not show when or how the request to sue was made, nor

upon what showing of facts, nor whether the persons who then composed the Board of Directors still continue in office. Only a minority of the board is charged with the wrongs asserted. * * * * For these and other reasons, even upon the assumption that the power of the Directors in the premises were not suspended by the receivership, the bill does not seem to me to satisfy the requirements of the rules laid down in Hawes *vs.* Oakland, 104 U. S. 450, and similar cases. It does not appear that the complainant 'exhausted all the means within his reach to obtain within the corporation itself, the redress of his grievances or action in accordance with his wishes.'"

But there is another fatal defect in the Bill; there is no allegation anywhere in the amended bill that plaintiff obtained the leave of the Comptroller to sue the Receiver. If it be held that that was unnecessary, then, clearly, he could not sue the Receiver until he had obtained leave of the Court in which the case at bar was pending, to make the receiver a party to the action. The Receiver was an indispensable party. Upon this subject, we again quote the opinion of Swope *vs.* Villard, supra: "Another fatal defect of the bill is that it does not show that the court which appointed the receivers has given the complainant leave to sue them. If the effect of the appointment of the receivers was such as appears from the bill, and was assumed or conceded on the argument, these receivers are indispensable parties; and the decision of the Supreme Court in Porter *v.* Sabin, 149 U. S. 478, 13 Sup. Ct. 1008, is conclusive. In that case, after a receiver of a corporation had been appointed by the state court, plaintiffs requested him to sue its president and auditor for money and property lost by their mismanagement. This request was brought to the attention of the Court, and being opposed by a majority of the stockholders, was denied. Then plaintiffs began their suit in the federal court, and applied to the state court for leave to make the receiver a party, and this applicaton was denied; and this was shown in the amended bill. Upon demurrer this bill was dismissed. Justice Gray, delivering the opinion of the Supreme Court, says: 'Any claim against the receiver of a corporation the

court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver, without the permission of the Court which appointed him. Barton *v.* Barbour, 104 U. S. 126; Railroad Co. *v.* Cox, 145 U. S. 593, 601, 12, Sup. Ct. 905.' It is argued that the necessity for obtaining such leave of court is dispensed with by section 3 of the act of August 13, 1888 (U. S. Rev. St. Supp. 613), which provides as follows: 'That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed.' No act or transaction of the receivers is involved in this suit, unless it be their refusal to sue as requested. In my opinion, that is not an act or transaction of theirs in carrying on the business within the meaning of this statute."

If plaintiff's theory is correct that the Comptroller of the Currency should bring the suit, and we suppose his demand upon the Comptroller of the Currency to bring the suit is in line with that theory, for the law never presumes that a person will do a vain and empty thing, then, the Comptroller of the Currency is not a party to this action, and we have a case of a judgment rendered here in a suit in which a necessary party was not brought into Court.

B.

THE CASE FOUND BY THE FINDINGS IS NOT THE CASE PRESENTED BY THE PLEADINGS.

To the Bill an answer was interposed by the defendants Thompson and Wilson, which by stipulation was to stand as

the answer of the defendant in error and the Bank (Trans. 57). The answer (Trans. 46) denies that the members of the Executive Committee or any of them ever assumed or had any other supervision of the officers and business of the corporation other than that imposed by Section 7 of the By-Laws or that they ever had any duties to perform other than that set out in said Section 7 of the By-Laws; then sets up Section 19 of the By-Laws which defines the duties and powers of the Cashier, and Section 24 of the By-Laws which provides for the appointment and duties of another sub-committee of the Board of Directors to be known as the Auditing Committee; then alleges the appointment of this latter Committee upon the organization of the Bank and its existence during the period the Bank remained in business. The answer then denies specifically all the allegations of negligence set out in the amended bill and sets up generally that the members of the Executive Committee acted with ordinary care and prudence in the management of the affairs of the Bank. The Findings find as facts all the facts alleged and not denied and find upon various evidentiary matters which are not usually included in findings and fail to find upon various material issues arising under the pleadings, but as this is an appeal from the judgment on the judgment roll alone, we understand that we are precluded from claiming that material issues are not found upon and are limited as regards these issues to the proposition that the findings do not support the judgment, which proposition we will discuss hereafter. In the Bill, under which the case was tried, an action for damages against the three members of the Executive Committee for neglecting their duties under a By-Law was presented. In the findings we have an action for damages against the President of the Board for failing to do something the Board of Directors should possibly have done, but which the Bill always claimed the Executive Committee should have done. A careful reading of the Bill will show its theory to be that the members of the Executive Committee are liable for the bad loans made by the cashier. A joint and several judgment is asked against them, not a several judgment against defendant in error. The Bill

alleges that (Trans. 10) "*as such Executive Committee*, said three persons, Richard P. Thomas, Robert R. Thompson, and Robert A. Wilson, immediately upon their said election and appointment as such committee assumed the discharge of the duties thereof and in due performance of their duties had from said date of their first appointment in October, 1886, continuously until the failure of said corporation, which is hereinafter mentioned, the immediate supervision of all the officers and business of said corporation; on the said three persons the above named defendants, Thomas, Thompson and Wilson *as such Executive Committee* devolved, and continuously remained throughout all of said time, the duty to exercise immediate supervision of all the officers and business of said Bank. (Trans. 11.) * * * * That it was the duty of each of said *members of the Executive Committee*, to exercise concurrently with his associates on said committee, diligence and fidelity in performing the duties of said Committee as above detailed." (Trans. 12.) Then after alleging the bad loans by the cashier, aver that "defendants Thomas, Thompson and Wilson utterly neglected their duty in the premises and wilfully neglected to take any care or exercise any supervision of the officials and business of the Bank, but negligently permitted the said Cashier to do as he pleased with and misuse, waste and lose the moneys of the Bank, & by reason of their negligence & omissions of defendants Thomas, Thompson and Wilson, and not otherwise, each and all of the said losses of the corporation occurred." (Trans. 19.) Then after alleging that a large profit would have been made, if the Cashier had been more fortunate in his investments, avers that all these prospective millions were "lost by the aforesaid improvident loans &c of the Cashier and the aforesaid negligence of defendants Thomas, Thompson and Wilson." (Trans. 19.) We do not know what the character "&c" stands for in the above connection. Perhaps the unfortunate Cashier had committed some other offenses which the learned pleader who drafted the Bill thought it wiser to leave to the imagination of the Court. The old rule of definiteness in a pleading does not appear to have cut much figure in the drafting of the Bill in

question, which then goes on to lay the closing of the Bank's doors to "the negligence of said defendants and the acts and misconduct of the Cashier." (Trans. 19.) The last allegation in the Bill on this subject is as follows:—"That the defendants Thomas, Thompson and Wilson are financially responsible and able to make good the losses which have resulted to said corporation by reason of their said negligence, and a judgment against them for the entire amount of such losses can be made and collected. (Trans. 21.)

Looking at it from every point of view the conclusion must be reached that this is a suit against the members of the Executive Committee for damages for negligence, not a suit against the President or the Vice-President for negligence as President or Vice-President. True the complaint sets out the By-Laws providing for the duties of those two officers, but it was surplusage to include them in the Bill as it is nowhere alleged in the complaint that either the President or Vice-President failed to perform those duties. Damages were asked against the defendant in error for failure to peform his duty as a member of the Executive Committee. In his answer he denied that he had been remiss in that regard, and that was the only issue at the trial. If A is the President and Secretary of a corporation, and he is sued in damages for negligently failing to perform his duties as Secretary, he cannot in that action be adjudged liable in damages for negligently performing his duties as President. And yet that is exactly what has been done in this case. The main issue,--the controlling issue in this case,—as to whether the Executive Committee were or were not negligent in letting the Cashier make loans, is not only not found upon, but not even hinted at in the Findings. The question of whether Thompson and Wilson were negligent is not touched upon, but, it is found that Thomas as President of the Bank had the supervision of its affairs and that *as such President he was negligent*, and as a conclusion of law finds that he is responsible for every dollar loaned by the Cashier. Not a single material issue arising from the pleadings is found upon in the Findings. There are findings upon various allegations in the Bill admitted in the answer, and the balance of the Findings

is entirely outside of the issues of the Pleadings. An examination of the Judgment Roll will probably disclose why the negligence was shifted from the shoulders of the Executive Committee in the complaint to the shoulders of the President in the Findings, and why there was no finding upon the negligence of the members of the Executive Committee. The Sixteenth subdivision of the Findings reads as follows :—(Trans. 87.) "From the defendants Robert R. Thompson and Robert A. Wilson—of, for and on account of said loss,—there has, in this action been collected the sum of Twenty-seven thousand five hundred,—($27,500) Dollars; leaving a net loss to the Bank, of the sum of One hundred and thirty-nine thousand four hundred and nineteen,—($139,419) Dollars." Turning to the transcript we find that this case went to issue in June 1893 (Trans. 57), was subsequently tried, and thereafter and on the 27th day of April, 1894, the Court rendered its decision awarding the plaintiff a judgment against the defendants Thomas, Thompson and Wilson, and ordering the appointment of a Referee to state an account (Trans. 58); that said Referee was appointed in June following (Trans. 60), and on August 17, 1894, reported that there was due to the Bank from the persons named in the order of reference on the day the Bank suspended (December 15, 1888) the sum of $197,-092.91. (Trans. 61–63.) In less than one month afterwards, after the decision of the Court had been rendered awarding this plaintiff a judgment for the benefit of the corporation, and after the report of the Referee had been filed fixing the amount of that judgment, the plaintiff files stipulations in Court (Trans. 64-66) renouncing and withdrawing his cause of action against defendants Thompson and Wilson, and consenting that a judgment of dismissal be entered as to them. Thomas was not a party to these stipulations. On September 24, 1894, in accordance with these stipulations, judgment of dismissal was entered as to Thompson and Wilson. (Trans. 67-69). The findings, which were not filed until November 20th, although the Court had awarded judgment on April 27th and the Referee had reported the amount of the judgment on August 17th, were silent as to

the negligence of Thompson and Wilson, but very eloquent as to the negligence of the President. In the meantime Thompson and Wilson had paid $27,500, less than one-seventh the amount found lost to the Bank, and the remaining Six-Sevenths was saddled on to Thomas.

It is a well settled rule that where the case found by the Findings is different from the case presented by the Pleadings, judgment will be reversed, and this will be done although the plaintiff had a good cause of action, and is entitled to relief substantially as decreed and could have amended the Bill so as to conform to the proofs and correspond with the Findings.

Bryan vs. *Tormey*, 84 Cal. 126.

It is also well settled that in an action on a contract the complaint must show the breach, or it states no cause of action which will support the judgment on appeal.

Curtiss vs. *Bachman*, 84 Cal. 216.

And the objection that the pleadings do not support the judgment may be taken on an appeal from the judgment on the judgment roll alone.

Putnam vs. *Lamphier*, 36 Cal. 151.

C.

THE FINDINGS DO NOT SUSTAIN THE JUDGMENT.

I.

THE FINDINGS AFFIRMATIVELY SHOW THAT THE PRESIDENT DID NOT HAVE THE GENERAL SUPERVISION OF THE AFFAIRS OF THE BANK, AND COULD NOT THEREFORE BE RESPONSIBLE FOR THE ACTS OF THE EMPLOYEES.

The findings set out Sections 7, 17, 18, 19 and 24 of the By-Laws under which it is claimed that Thomas alone is liable for the bad loans made by the Cashier. Section 7 we have already set out in full. Section 18 regulates the duties of the

Vice-President, which are not material on this discussion, sec-17 regulates the duties of the President, Section 19 the duties of the Cashier, and Section 24 the duties of the Auditing Committee. (Trans. 71–76.)

After setting out these By-Laws, the findings find as a fact that these By-Laws imposed upon the President alone "the duty of seeing that the money of said Bank was not wasted or misused" and the duty "to use his own skill and discretion in conducting the affairs and business of the Bank." (Trans. 77.) This, at the best, is not a finding of fact. The finding itself shows that it simply is the opinion of the Judge who signed them that the By-Laws impose that duty, because it finds that defendant in error "took, assumed and had general control and supervision of the affairs of the Bank with authority and power as set forth in said By-Laws." (Trans. 77.) We submit that the By-Laws incorporated in the findings show that he did not have the general control and supervision of the affairs of the Bank and that the conclusion drawn by the Court that he did have, is not warranted by the By-Laws which, it is found, alone gave him that authority. The By-Laws having been set out in the findings, the Court's view of the duties imposed upon its officers by such By-Laws is a legal inference and not a fact, which has no place in the findings. From these By-Laws it appears (Section 7) that the Board of Directors was authorized to appoint an Executive Committee "who shall have and exercise immediate supervision of all the officers and business of this Bank. * * * * Who shall have power to discount and purchase bills of exchange, coin and bullion and loan money on personal security," and although it is not found in the findings, it is alleged in the Bill and admitted in the answer that said Executive Committee was appointed in pursuance of said By-Law and consisted of the defendant in error and Thompson and Wilson, who assumed the duties of their office, and remained in office until the Bank suspended. Section Seventeen (Trans. 72-74) provides that "the President shall have general control and supervision of the affairs of the Bank. * * * * He shall have power and authority to discount bills, notes and other evi-

dences of debt and make loans not exceeding $10,000.00 to any single individual, firm or corporation; buy and sell bills of exchange; sign certificates of deposit and draw warrants and checks upon the Bank." But Section 7 had already given immediate supervision to the Executive Committee. The power to appoint the officers is solely with the Board of Directors. That is regulated by Section 5136 Revised Statutes. The power of removing the officers was not given to the President; he could suspend them for cause but had to report his action and the occasion thereof to the Directors. (Trans. 74). His duty to make loans was limited to $10,000 to any single individual (Trans. 72) while the power of the Executive Committee to make loans is unlimited (Trans. 72). That he did not have supervision of the Cashier and that his office was entirely independent of the Cashier's is shown by reference to Section 19, which sets forth the duties of the Cashier. (Trans. 74-76). The Cashier could make loans under the same restrictions as the President (Trans. 75), and he alone had the custody of the evidences of indebtedness and securities of the Bank and the moneys belonging to the Bank, and could deliver them only upon the order of the Board of Directors. (Trans. 76). It is clear from reading these By-Laws that the general supervision of the Bank rested with the Board of Directors; that the Executive Committee was given the immediate supervision of the officers and business of the Bank but had to report to the Board at each regular meeting, and that the President was given general supervision of the affairs of the Bank, but he was required to report to the Board and he had nothing to do with the officers except to suspend them for cause. The general supervision of all the employees of the Bank having been given to the Executive Committee by a previous Section, the general supervision could not be given to the President by a subsequent Section as attempted in Section Seventeen. (Trans. 72-74).

2.

THE FINDINGS ARE FATALLY DEFECTIVE IN THAT THEY FAIL TO SHOW THAT THE CASHIER WAS NEGLIGENT, AND BEFORE THE DEFENDANT IN ERROR COULD BE HELD LIABLE FOR DAMAGES RESULTING FROM THE NEGLIGENCE OF AN EMPLOYEE, NEGLIGENCE OF THAT EMPLOYEE MUST BE SHOWN.

The duties of the Cashier are set forth as we have seen in Section 19 of the By-Laws. He could have had no other duties for the Banking act provides that the Board of Directors shall employ him and specify his duties, and the act of the Board is the By-Law specifying those duties Under Section 19 (Trans. 74–76) he was to keep a record of all proceedings of the meetings of the Directors and stockholders. There is no finding that he did not do so. He was required when requested by the President or two Directors to cause notice to be given of all meetings of the Board of Directors and of the stockholders. There is no finding that he did not do so. He was to countersign all certificates of stock; all receipts for circulating notes received from the Comptroller of the Currency, and he was to promptly and accurately prepare and forward all reports and perform all acts required by the laws of the United States or regulations of the Treasury Department. There is no finding that he failed in any of these requirements. He was to sign or countersign and when necessary affix the seal of the Bank to all contracts, deeds, evidences of debt and other instruments in writing which were necessary and proper in the transaction of the ordinary business of the Bank, or which had been approved by the Board of Directors and to do all acts required by the Board. There is no finding that he was deficient in this regard. He was required to keep the stock certificate book and transfer book and see that the proper entries were made therein. There is no finding that he did not do so. He was to have supervision and custody of all records, minutes, papers, books, vouchers, notes, bonds, evidences of indebtedness and securities of the Bank unless otherwise specially directed by the Board of Directors and

he was to be responsible for all moneys, funds and valuables belonging to or deposited with the Bank and was required to account for and deliver the same upon order of the Board of Directors, or to any person authorized to receive them. It is not found that he violated this provision of the By-Law. He was to make such statements of the condition, finances and business of the Bank to the Directors and stockholders as might from time to time be required by the President or Board of Directors of him. It was not found that he ever failed to make such statements when required. He was to give bonds with security to be approved by the Board of Directors in the sum of Ten Thousand Dollars for the faithful discharge of his duties. It is not found that he failed to do this. Then comes the only other duty imposed upon him by the By-Law. He might—you will notice the language is permissive—the word "may" is used—under the direction and with the concurrence of the President discount bills, notes or other evidences of debt and make loans under the same restrictions as the President; issue and sign certificates of deposit and draw checks and warrants upon the Bank in the ordinary and usual course of its business and pay the current expenses of the Bank when approved by the Executive Committee.

Here are the findings in reference to the acts of the Cashier: Sub. 5—"By reason of said neglect of the President, the said Cashier, without the direction or the attempted direction of the President, Vice-President, Executive Committee, or any or either of them, loaned out the moneys of the Bank in large sums to divers irresponsible persons with no adequate security, and bought unsecured and valueless bills and notes and made loans on informal promises and pretended securities of little or no value." (Trans. 81.) It does not affirmatively appear from this finding that the Cashier knew that the parties he was dealing with were irresponsible or that the security was inadequate or that the bills and notes bought by him were unsecured and valueless. What the finding means by "informal promises and pretended securities of little or no value" is something we do not exactly understand. It does not appear who made the "informal promises," and it does not appear

that the fact that "the securities were of little or no value" was known to the Cashier. There is nothing in this finding inconsistent with the conclusion that the Cashier was acting in the ordinary course of business, and as a competent and skilled officer of the Bank, exercising his discretion in making loans on personal security, which character of loans is expressly permitted by the Seventh Subdivision of Section 5136 of the Revised Statutes. The way a commercial bank usually makes money is by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt and by "loaning money on personal security." He was not required to take a mortgage whenever he loaned money. That would have defeated the purposes for which the bank was organized.

Subdivision Eight of the findings is in reference to a transaction had with the Alameda County Railroad Company, a client of the Bank, through its President J. H. Woodard. That part of it which concerns the Cashier is as follows: "He, the said Woodard, offered to said Cashier at different times between May 7th, 1888, and the failure of said Bank, his drafts to a large amount on one Daniel Macauley who was a person of no financial standing; said drafts were not secured; to buy said drafts was entirely inconsistent with banking principles, reckless and wrong; but the said Cashier bought said drafts, these drafts were dishonored and not paid and by reason of the premises the Bank lost $68,500." It does not appear affirmatively from this finding that the Cashier knew that Daniel Macauley, the drawee, was a person of no financial standing, and even if that fact did affirmatively appear from the finding, it would not show negligence upon the part of the Cashier, unless it is also found that the Cashier knew Woodard to be insolvent. Woodard was a client of the Bank, and, in discounting his drafts, the responsibility of the drawer cuts some figure in the transaction. The finding that the drafts were not secured, does not show any negligence upon the part of the Cashier, for, as we have seen, the National Banking Law especially provides that loans may be made on personal security and none of the By-Laws of this Company prohibited the making of loans on personal security. The finding that the pur-

chase of these drafts was "inconsistent with banking principles, reckless and wrong," in the light of subsequent events, might have been so construed, but there is nothing to show that, at the time the transaction took place, the purchase of the drafts was "inconsistent with banking principles;" then, the conclusion in the finding that because the drafts were dishonored and not paid, the Bank lost the amount of the drafts, appears to us a very violent presumption. The finding fails to show that any legal measures were ever resorted to for the collection of the drafts or that they could not be collected by the ordinary legal measures.

The Ninth Subdivision of the finding refers to a transaction with one Gutman who, it is found, offered the said Cashier his drafts for large sums aggregating $67,000.00. The circumstances surrounding the Cashier's connection with this particular transaction, are found as follows: "The drawee was irresponsible, said drafts were dishonored, and they were dangerous and the purchase thereof was inconsistent with good banking, but the Cashier bought them. They were dishonored, only $15,000 could be realized upon them and the balance due thereon was entirely lost to the Bank." It does not affirmatively appear from this finding that the drawer was irresponsible. The early portion of this finding describes him "as a person of no good financial standing and as an unsafe borrower." "No good financial standing" probably means that he had some financial standing, and an "unsafe borrower" conveys rather a shadowy impression. It also appears from this finding that the drafts, which were for $67,000, were dishonored, but that $15,000 could be realized upon them. Does it mean that this $15,000 was paid after they were dishonored? If so, the learned counsel for Mr. Chetwood, who drafted these findings, is drifting away from his theory. He sued the Executive Committee as guarantors whose liability attached on the breach, and in this finding he only attempts to hold defendant in error for what could not be realized upon the drafts. "Consistency thou art a jewel!" It also affirmatively appears from this finding that "the drawee was irresponsible; said drafts were dishonored and they were dangerous." What was danger-

ous? The drawee or the drafts, and how did the danger arise and who did it affect?

Subdivision Ten of the findings refers to a transaction with one Wickham, who it is found "borrowed of the Bank by connivance with the Cashier, divers large sums of money on promissory notes, over-drafts, drafts and acceptances, to an amount aggregating more than $45,000." It does not appear that the Cashier received any portion of this money for himself or that he benefitted in any way by the loan. We usually use the word "connivance" in reference to some transactions which could not bear investigation. We submit that the connection in which it is used in this finding, is improper; but how did the Cashier connive? It does not appear that the promissory notes were not good notes. It does not appear who signed them. Rothchild may have been the maker for all the finding shows on the subject. The finding then goes on to show that "almost all the indebtedness of said Wickham was unsecured and no considerable part of said indebtedness could be recovered and the Bank lost by these transactions about $45,000," but the whole transaction amounted to but $45,000. If any part at all of it could be recovered, ought not the Cashier and the Executive Committee to get the credit of it? Then, it appears that a portion of the indebtedness was secured, but it fails to find that the securities have been sold and realized nothing.

These are all the findings in reference to the negligence of the Cashier. He is mentioned however, once or twice afterwards in Subdivision Thirteen (Trans. 86), where it is found that Thomas "negligently permitted said Cashier to do as he pleased with, misuse, waste and lose the said moneys of the Bank and by reason of the aforesaid negligence of said President and said action of the Cashier so negligently permitted and the said loss of money resulting therefrom," the Bank failed, and in Subdivision Seventeen, the loans made by the Cashier are referred to in this way: (Trans. 88) "the said Comptroller by reason of the aforesaid misuses and waste of funds by the Cashier was unable to realize" &c. We submit that there is nothing in any of these findings that show a

neglect of duty upon the part of the Cashier. In passing By-Law Number 19, the Board of Directors virtually gave the Cashier the control of discounting notes and making loans, and they had full power to do so. The case of Briggs *vs.* Spaulding, *supra*, decided that, under the amendment of 1874 to the Revised Statutes, which permitted the business of the Bank to be carried on through the Board of Directors, "or duly authorized officers or agents," the Board was justified in giving the Cashier the power to make loans.

3.

THE FINDINGS ARE FATALLY DEFECTIVE IN THAT IT DOES NOT AFFIRMATIVELY APPEAR THEREFROM THAT THE PROPER DEMAND HAD BEEN MADE BY THE PLAINTIFF STOCKHOLDER BEFORE THE COMMENCEMENT OF THE ACTION.

There is a finding, Finding 18, (Trans. 88) that, "The plaintiff herein prior to the commencement of this action, in due form requested said corporation, its Board of Directors, the said Receiver appointed to take charge of said insolvent bank, and the Comptroller of the Currency for said corporation to bring suit against said Executive Committee and the several members thereof; the above named defendant herein, for the amount of money which the said corporation lost by reason of the failure of said bank resulting from the negligence of said Committee and its members; and the said corporation, its Board of Directors, the said Receiver and Comptroller, each and all refused to bring any suit or legal proceedings in the premises," but we have seen that such demand did not authorize the bringing of the action. Before any judgment could be entered in this action the Findings had to show affirmatively, that prior to the commencement of the action the plaintiff made a demand upon the Board of Directors to commence the suit, naming the time and place where such demand was made. It should also have affirmatively appeared that he had requested the Comptroller to have

the Receiver commence the action. As we have seen, it was idle for him to ask the Comptroller to commence the action himself for he was not the proper party, and it was idle to ask the Receiver to commence the action for he could not do so without the consent of the Comptroller. He might possibly have excused himself if some Court having jurisdiction had ordered him to commence the suit, but there is no finding that such an order was made by any Court. The Findings also fail to show that any leave was ever obtained by this plaintiff to sue the Receiver even from the Court in which this action was pending or from the Comptroller.

4.

ASSUMING THAT THE CASHIER WAS WILFULLY NEGLIGENT AND THAT THE PRESIDENT HAD GENERAL SUPERVISION OVER HIM, THE FINDINGS ARE FATALLY DEFECTIVE IN THAT THEY FAIL TO SHOW THAT THE PRESIDENT HAD KNOWLEDGE THAT THE CASHIER WAS MAKING LOANS TO IRRESPONSIBE PERSONS OR UPON INADEQUATE SECURITY.

This proposition we have discussed at length under the heading "the complaint fails to state any cause of action against the appellant." The Findings have not helped the Bill in this regard. They fail to show that the defendant in error knew that the Cashier was making these loans, and failed to show that, even if he had such knowledge, he was aware of the fact that the loans were being made to irresponsible persons or upon inadequate securities. The knowledge not having been brought home to the President, and there being no finding that he had benefited in any way by these loans, a judgment against him will not be sustained.

5.

THE ACTION BEING AGAINST THREE TORT-FEASORS FOR DAMAGES FOR NEGLIGENCE, THE RELEASE OF TWO TORT-FEASORS FOR A VALUABLE CONSIDERATION, RELEASED THE THIRD.

Assuming that the bill set up a cause of action, then, the cause of action was against the three members of the Executive Committee for damage the Bank had sustained by reason of their negligence. The action sounded in *tort*, not in contract. They were sued as joint tort-feasors; a joint and several judgment was asked against them for Four Hundred Thousand Dollars, which it is claimed their negligence lost to the Bank. Under the bill no one of the three had caused a greater damage than either of the others; each inflicted the same amount of damage to the corporation; each had failed to perform the duties imposed upon them by the By-Law as members of the Executive Committee. The obligation was joint; the negligence was joint.

For the purpose of this argument, we assume that the rule in actions of this character is that a stockholder bringing the suit for the benefit of the other stockholders has complete control over the litigation until the judgment is entered, and that the law will presume in the absence of fraud that whatever step he took in the course of the litigation was in the interest of the corporation. For the purpose of the suit he represents the corporation. If the theory of the Bill in this case was correct, then, he was entitled to recover judgment against Thompson, Wilson and Thomas jointly for Four Hundred Thousand Dollars, and costs. After the trial Court had rendered its decision in April holding that the corporation was entitled to a judgment against these three for the amount lost to the Bank through the loans of the Cashier, and had appointed a referee to ascertain the aggregate amount of those loans, and after the referee had made his report it was a simple matter to ascertain what the judgment should be. The referee reported that at the time the Bank failed the aggregate amount due on those three loans was $197,092.91. Shortly afterwards the plaintiff in the original action releases two of these joint debtors for $27,500.00 cash. The Findings expressly find this payment by Thompson and Wilson, and direct that it shall be applied on account of the damage that the Bank has sustained. What damage? If the damage was caused by Thomas

only, why should Thompson and Wilson pay $27,500 on account of it, and why should the Bank order their payment credited on the amount due by Thomas to the Bank by reason of his negligence? It is very clear that this money was paid by two of these joint tort-feasors in settlement of the Bank's claim against them, and that as the plaintiff had brought the suit and had the exclusive control of it until it was ended, they felt that he could release them from the corporation's claim. We insist that the payment of $27,500 by Thompson and Wilson and the entering of a judgment of dismissal against them in consideration of that payment, had the same effect as if a judgment had been entered for the plaintiff against Thompson and Wilson for $27,500.00, and had been paid. The condition of affairs then, would have been that in a suit brought against three joint feasors for damages for *tort*, the plaintiff recovered judgment against two jointly for $27,500 and against the third one for $139,419. We submit that such a judgment could not stand. In McCool *vs.* Mahoney, 54 Cal. 491, the plaintiff sued the defendants for malicious arrest and prosecution. The jury rendered a verdict against Mahoney for Three Thousand Dollars and against Small for Five Hundred Dollars and judgment was entered accordingly. The judgment was reversed by this Court on the ground that as the action was for a wrong in which both defendants joined, the damages could not be severed. In Beal *vs.* Finch, 11 New York, 128, which was an action to recover damages for an assault and battery alleged to have been committed by the defendant and five others, the Court held that in such an action the damages were not divisible, and should the jury erroneously assess different amounts against the defendants, the plaintiff should have judgment against all who are convicted for the largest amount found against any one. Supposing in the case at bar the plaintiff had not settled with Wilson and Thompson and released them from the debt, and the Judge had found that Thomas was liable for One Hundred Thousand Dollars, Thompson for Seventy-five Thousand Dollars and Wilson for Fifty Thousand Dollars, could it have stood? The plaintiff had elected to sue them jointly, were not the defendants themselves entitled to a joint judgment?

Could any one of them be deprived of his right to enforce contribution by a settlement made by the plaintiff without his sanction? Under the pleadings, how could the Court find that Thomas was liable for $139,419? It is a mystery to us now how the amount of the judgment was ever reached. The Referee reported the loss to be $197,092.91. The findings fix it at $166,919.00, credit Thompson and Wilson with $27,500.00 and assess the balance to Thomas. In Halsey *vs.* Woodruff; 9 Pick. 555, which was an action for trespass against two defendants, the Court had this to say upon the subject for release to one joint tort-feasor: "The result of the authorities, which are numerous, is, that where a joint action is brought against two for a trespass done and there is a judgment against both, it must be a judgment for joint damages. All the legal consequences of there being a joint judgment must necessarily follow; one of which is, that each is liable for all the damage which the plaintiff has sustained by such trespass without regard to different degrees or shades of guilt. * * * * Each defendant is liable for the whole damages of a joint trespass. *A release to one discharges both, and the reason is, that the damage is joint.*" In Hillman *vs.* Newington, 57 Cal. page 56, which was an action against eight defendants for an injunction to restrain them from diverting the waters of a stream, it was held that the suit was properly brought against the eight, because plaintiff was only entitled to a certain specific amount of water, and as it was only by the joint action of the defendants that he was deprived of that amount, the wrong was committed by them jointly because no one of them alone was guilty of any wrong. Each of them, it is true, diverted some of the water, but the volume was only reduced below the amount to which the plaintiff was entitled by the aggregate act of all. In Urton *vs.* Price, 57 Cal. 270,—an action for damages for personal injuries which was originally brought against Price, but in which plaintiff subsequently obtained an order to add the Mechanics' Institute as a defendant,—a stipulation was filed discontinuing and dismissing the action as to the defendant, The Mechanics' Institute. Judgment of dismissal was

entered as stipulated and the following day Price filed an amended answer in which he set forth that after the commencement of the action, the plaintiff had accepted $500 from the Mechanics' Institute and had dismissed the suit as to the Institute. The jury found that the plaintiff had received satisfaction for the injury alleged in the complaint from one of the defendants. The Court held this to be a release of his claim against Price. In Tompkins *vs.* Clay Street Railroad Company, 66 Cal. 163, an action against two railroad companies to recover damages for personal injuries, and in which class of cases it is the rule that the injured party may sue either or both or dismiss as to either, and if it turned out at the trial that one was not guilty of negligence, he may on sufficient evidence take a verdict against the other, it appeared that one of the companies paid $550 and took a release. The Court found that this was satisfaction as to both.

It is not at all clear that the plaintiff could have brought separate suits against these three Directors for negligence where the negligence consisted in failing to do something which they should have done, but assuming that separate suits had been brought and judgment for different amounts had been rendered in each, there is no doubt that a satisfaction of one judgment would have been a satisfaction of all. This rule was laid down in Livingston *vs.* Bishop, 3d American Decisions, 330, by Chancellor Kent, which held that where separate suits are brought against several defendants for a joint trespass, a separate recovery may be had against each, but the plaintiff can have but one satisfaction and he may elect *de melioribus damnis*, and issue his execution therefor against one of the joint trespasses. "On looking into the books," says the Chancellor, "with a view to this question, I was surprised to meet with so much contradiction and uncertainty on the subject. The cases are not all capable of being reconciled to each other, and some of them appear to me not reconcilable with reason. It is, however, a proposition that is not controverted, but is everywhere admitted, that for a joint trespass, the plaintiff may sue all the trespassers jointly, or each of them separately, and that each is answerable for the act of all. It would seem to result from

this doctrine, that a trial and recovery against one trespasser is no bar to a trial and recovery against another. If there can be but one recovery, it is in vain to say that the plaintiff may bring separate suits, for the cause that happens to be first tried, may be used by way of plea *puis darrien continuance* to defeat the other actions that are in arrear. The more rational rule appears to be, that where you elect to bring separate actions for a joint trespass, you may have separate recoveries, and but one satisfaction; and that the plaintiff may elect *de melioribus damnis*, and issue his execution accordingly; and that where he has made his election, he is concluded by it, and that if he should afterwards proceed against the other defendants, they shall be relieved on payment of their costs." The acceptance by the plaintiff of a money consideration for the release of the two joints tort-feasors was a satisfaction of his claim against all of them, and where the findings show affirmatively that the money was received and credited on the plaintiff's cause of action, a judgment against the remaining tort-feasors cannot be sustained.

It is respectfully submitted that the judgment of the Supreme Court of California be affirmed.

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